CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by California Medical Association concerning the Board of Podiatric Medicine's policy decision of 2/17/84 stating that a doctor of podiatric medicine may use the terms "podiatric physician," "podiatric surgeon," and "podiatric physician and surgeon"	1990 OAL Determination No. 18 [Docket No. 90-001] December 26, 1990 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the "policy decision" of the Board of Podiatric Medicine that a doctor of podiatric medicine may use the terms "podiatric physician," "podiatric surgeon," and "podiatric physician and surgeon" is a "regulation," and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that this "policy decision" is a "regulation."

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not the Board of Podiatric Medicine's "policy decision," adopted February 17, 1984, regarding the use of various professional terms, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION [4,5,6,7,8]

OAL finds that:

(1) the Board's rules are generally required to be adopted pursuant to the APA; and

(2) the Board's "policy decision" of 2/17/90 constitutes a "regulation" as defined by the key provision of Government Code section 11342, subdivision (b).

(3) the provisions of the challenged rule found to be "regulations" do not fall within any established exception to the APA; and therefore,

(4) the Board's "policy decision" violates Government Code section 11347.5, subdivision (a).[9]

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
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> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][10]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

As early as 1915 in California, the board of medical examiners which issued certificates authorizing physicians and surgeons and "drugless practitioners" to practice also issued a third type of certificate, one " . . . authorizing the holder thereof to practice chiropody."[11],[12] The statutory provisions which authorize various forms of medical practice have expanded over the years and are now embodied in the Medical Practice Act ("MPA"), under which most of California's medical practitioners are licensed and regulated.[13] Today, the Medical Board of California, governed by the MPA, consists of three divisions, including the Division of Allied Health Professions.[14] The Division of Allied Health Professions is responsible for " . . . the activities of examining advisory committees and nonphysician licentiates under the jurisdiction of the [medical] board." [Emphasis added.][15],[16]

Among these examining committees is the California Board of Podiatric Medicine, which regulates and licenses podiatrists, as chiropodists are now known.[17] The Board of Podiatric Medicine ("Board") issues a certificate to practice podiatric medicine, based on appropriate education and examination. "Podiatric medicine" is defined as:

> " . . . the diagnosis, medical, surgical, mechanical, manipulative, and electrical treatment of the human foot, including the ankle and tendons that insert into the foot and the nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot." Business and Professions Code section 2472.[18]

Authority [19]

Section 2470 of the Business and Professions Code grants rulemaking authority to the Board and expressly requires that it follow the APA when it adopts, amends, or repeals regulations "necessary to enable the board to carry into effect the provisions of law relating to the practice of podiatric medicine."[20] The Board now has approximately 27 regulations, covering topics such as applications for certificates to practice, podiatry education and residency programs, fees, advertising, and a system for disciplinary citations and fines.

In addition to the broad duty to regulate in order to "carry into effect the provisions of law relating to the practice of podiatric medicine," section 2222 of the Business and Professions Code specifically charges the Board with administering the enforcement provisions of the Medical Practice Act with respect to podiatry certificate holders.[21]

Background: This Request for Determination

On June 22, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[22]

On July 20, 1990, OAL received a public comment from Richard M. Glovin, of Kronick, Moskovitz, Tiedemann & Girard, Attorneys for the California Podiatric Medical Association. Their "Third Party Comment" ("Comment") urges OAL to determine that the challenged policy decision is not a "regulation" required to be adopted in compliance with the APA.

On August 1, 1990, OAL received the Board's Response to the Request for Determination ("Response"). The Board argues that the challenged policy decision relates only to the internal management of the Board and therefore is not a "regulation."

II. ISSUES

There are three main issues before us:[23]

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISIONS OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."[24] Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.[25]

In addition, Business and Professions Code section 2470 provides:

> "The board may adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, regulations which are necessary to enable the board to carry into effect the provisions of law relating to the practice of podiatric medicine." [Emphasis added.]

We are aware of no specific statutory exemption which would permit the Board to conduct rulemaking regarding the use of the terms "physician," "surgeon," or "physician and surgeon" without complying with the APA.[26] The Board has not disputed that the APA generally applies to its rulemaking activities.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISIONS OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

In Grier v. Kizer,[27] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

> First, is the challenged rule either
>
> o a rule or standard of general application or
>
> o a modification or supplement to such a rule?
>
> Second, has the challenged rule been adopted by the agency to either
>
> o implement, interpret, or make specific the law

enforced or administered by the agency or

o govern the agency's procedure?

If an uncodified agency rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.][28]

A. Part One - Does the Board's Challenged Policy Decision Establish a Rule or Standard of General Application or Modify or Supplement Such a Rule?

The answer to the first part of the inquiry is "yes." The Board clearly intends the challenged policy decision to apply to all persons who practice podiatric medicine and who wish to use the terms "podiatric physician," "podiatric surgeon," or "podiatric physician and surgeon."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[29] For example, it has been judicially held that "rules significantly affecting the male prison population" are of general application.[30]

The challenged policy decision is intended to apply to all members of a class, specifically, all podiatrists who wish to use the terms which are the subject of the policy decision. In its Response, the Board states that "[t]he policy does not set forth a standard of general application," (Response, p. 3) but does not develop a claim that the challenged provision is not meant to apply generally to all persons under the jurisdiction of the Board.[31]

The Board's primary argument is that the policy decision "relates only to the internal management and operation of the Board of Podiatric Examiners."[32] This argument fails to address the question of whether the policy decision meets the definition of a "regulation." The internal management exception is relevant only after a challenged rule has been determined to meet the two-part definition of a

"regulation": if a rule identified as a "regulation" falls within the exception, then, although it is a standard of general application which interprets, implements or makes specific an agency's law or governs its procedure, it need not be adopted under the provisions of the APA. The question of whether or not the challenged policy decision falls within the internal management exception will be discussed below in the third section of Part II of this Determination.

The Comment by the California Podiatric Medical Association ("CPMA") also relies primarily on the argument that the challenged rule falls within the "internal management" exception. The CPMA also questions whether the policy decision is a standard of general application because it does not "impact persons other than podiatrists and the . . . [Board] itself . . . ."[33] The CPMA argues that "[t]he BPM and CPMA [are] the only groups directly affected by the policy . . . ."[34] Even if the challenged rule's effects were so limited that they only affected a small segment of the public, for example, persons choosing a health care practitioner, the limitation to one class or category does not mean that a challenged rule is not a standard of general application. Thus, although the arguments are presented as if to address the threshold question as to whether the challenged rule is a standard of general application, in each case, the argument fails.

The challenged rule is a standard of general application, clearly meant to apply to all members of the affected class, not just to one individual practitioner seeking an opinion as to whether the particular use of a term is proper. Once we have determined that the challenged rule is a standard of general application, we can then proceed to analyze whether it has been adopted to implement, interpret, or make specific the law enforced or administered by the Board or to govern the agency's policies.

B. Part Two - Does the Challenged Provision Establish a Rule Which Interprets, Implements, or Makes Specific the Law Enforced or Administered by the Agency or Which Governs the Agency's Procedure?

The challenged "policy decision" adopted by the Board on February 17, 1984, and entitled "Use of the Title Podiatric Physician and Surgeon," states in full:

> "It is the opinion of the Board of Podiatric Medicine (BPM) that a doctor of podiatric medicine may use the broader terms of podiatric physician, podiatric surgeon or podiatric physician and surgeon, but not the narrow terms, 'physician and surgeon', [sic] 'physician' or 'surgeon'. [sic] The BPM would not consider the

> broader usage in violation of the relevant statutes and would not investigate or prosecute a doctor of podiatric medicine who used the broader titles. However, doctors of podiatric medicine are advised that this opinion is not currently held by the Division of Allied Health Professions of the Board of Medical Quality Assurance. Section 2054 of the Business and Professions Code prohibiting and restricting the use of those terms by unlicensed persons provides for criminal penalties and is enforced by the Board of Medical Quality Assurance [now the "Medical Board"] and local district attorneys."

The use of specialized terms like "doctor," "physician," and "surgeon" by "nonphysician" or specially licensed health practitioners has generated much debate, resulting in numerous statutes, regulations, administrative proceedings, judicial actions, and attorney general's opinions over the years, mostly cast as issues of unlicensed practice or misleading advertising. The Requester has not only challenged the use of the "policy decision" without proper adoption under the APA, but also alleged that the rule is inconsistent with existing law. OAL has no authority to make a determination with respect to the rule's consistency with law unless the rule has been formally adopted under the APA and is before OAL for review in the course of the rulemaking proceeding.[35]

Interpret, Implement, or Make Specific?

Thus, the immediate question is: does the challenged rule interpret, implement, or make specific any of the provisions of law which the Board is charged with enforcing? The answer is that this is precisely what the "policy decision" does or purports to do. In order to understand which provisions of law the "policy decision" interprets, implements, or makes specific, it will be helpful to describe more fully the laws affecting the practice of podiatric medicine in California.

First and most narrowly, a specific body of statutes governs the Board of Podiatric Examiners and the practice of podiatric medicine.[36] This article is within the chapter of the Business and Professions Code governing the practice of medicine generally; many of the provisions in that chapter also apply to podiatric medicine, particularly with respect to licensing and advertising.[37] Finally, the Business and Professions Code regulates the conduct, including the advertising, of any business or profession in California.[38]

There can be little doubt that the challenged "policy decision" is the Board's interpretation of Business and Professions Code section 2054 which prohibits the use of terms or letters falsely indicating the right to practice as

a physician or surgeon without holding the proper certificate under the MPA.[39] The policy decision itself refers to section 2054. This type of interpretation is well within the Board's power; the Board has already adopted one regulation concerning advertising[40] and implements many others in its regulation on citations and fines.[41]

The first sentence of the challenged rule expresses the Board's opinion that its licensees may use the questioned terms. Unless this pronouncement, debated and duly adopted by the Board, were meaningless, it must be intended to guide the behavior and practice of the Board's licensees. In its Response, the Board argues that:

> "The policy decision quite clearly relates only to the internal management of the Board of Podiatric Medicine since it specifically concerns those situations where that Board will not pursue an enforcement action." [Emphasis added.][42]

This argument appears to imply that the challenged rule is not a "regulation" as long as it informs the public of situations in which the Board will not act. This argument further implies that if the challenged rule gave notice of situations in which the Board would proceed with disciplinary action, then the rule would indeed be a "regulation." Yet, the first sentence is very similar to a statute such as Business and Professions Code section 2055, which expressly permits the use of the letters "M.D." but is no less a statute for being permissive rather than prohibitive.[43] The dispositive question is not whether the rule requires action or inaction, but whether it interprets, implements, or makes specific the law the agency is charged with enforcing.[44]

The Board also argues that it has already adopted a regulation "on the subject"--presumably the subject of advertising.[45] Similarly, the CPMA, in its Comment, argues that the policy decision "is not intended to supplant BPM regulations concerning advertising." In light of the existence of section 1399.688, Title 16, CCR, the CPMA's argument continues:

> "The policy decision does not amend or expand the validly adopted advertising regulation, nor does it contravene Section 651(b) relating to misrepresentation of facts or failure to disclose. To the contrary, use of the terms 'podiatric physician' or 'podiatric surgeon' gives more information and is more descriptive than the narrow terms 'physician' and 'surgeon.'"[46]

As noted in endnote 41 of this Determination, section 1399.688, Title 16, CCR, implements section 651, specifically subdivision (i), of the Business and

Professions Code.[47] This provision regulates the advertising of services provided by licensees in podiatry; it does not regulate the use of particular terms in advertising the podiatrist's professional title. Thus, one reason that the policy decision does not amend section 1399.688 is that it interprets a different provision of section 651. It could, in fact, be seen as expanding on the existing advertising regulation. It is also correct that the policy decision does not contravene section 651, subdivision (b); in fact, not only is the challenged rule consistent with section 651, subdivision (b), it interprets the statute and establishes which public communications the law proscribes, and which it permits. Finally, the last sentence states quite well why a regulation containing the first sentence of the policy decision might be a desirable and necessary interpretation of the various statutes and cases addressing the sensitive area of advertising which is permissible, informative, and not misleading.[48]

Or Govern the Agency's Procedure?

Even if one were not persuaded that the challenged rule, which is indisputably a standard of general application, interprets, implements, or makes specific the law which the Board is charged with administering and enforcing, there can be no doubt that the challenged rule is meant to govern the agency's procedure.[49] In addition to giving guidance to the Board's licensees wondering whether they are permitted to use certain terms in advertising their professional services, the policy decision, in its second sentence, states:

> "The BPM would not consider the broader usage in violation of the relevant statutes and would not investigate or prosecute a doctor of podiatric medicine who used the broader titles." [Emphasis added.]

Both the Board and the commenter emphasize that the policy decision simply sets forth the Board's "internal policies," "relates only to the internal management and operation of the Board," and "relates only to the internal management of the Board ... since it specifically concerns those situations where the Board will not pursue an enforcement action,"[50] and "concerns only BPM's response to the use of" the specified terms, is "an internal policy statement that does not affect any parties other than its proponents," "relates only to the BPM's internal response," "is a statement of non-enforcement," and "merely states that the BPM will take no action against a practitioner who uses the descriptive terms at issue."[51]

All parties agree that the challenged policy decision governs the Board's procedure regarding what the Board defines as appropriate advertising by its licensees and how

it will respond to the use of particular terms and titles. Both the Board and the CPMA maintain that the challenged rule, whether defined as a "regulation" or not, is the type of rule governing agency procedure which concerns only "internal management" and should therefore be exempt from the procedural requirements of the APA. We discuss the internal management exemption from the requirements of the APA in the next section.

WE THUS CONCLUDE THAT THE POLICY DECISION OF 2/17/84 CONSTITUTES A "REGULATION" AS DEFINED BY THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE IDENTIFIED AS A "REGULATION" FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTIONS TO THE APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.[52] Government Code section 11342, subdivision (b), contains the following specific exception to APA requirements:

> "'Regulation' means every rule, regulation, order, or standard of general application . . ., except one which relates only to the 'internal management' of the state agency." [Emphasis added.]

The cases which have interpreted the "internal management" exception have nearly uniformly limited the exception to a very narrow class of rules.[53] A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" under review (1) affects only the employees of the issuing agency[54],[55] and (2) does not address a matter of serious consequence involving an important public interest.[56],[57]

The Board, in its Response to the instant Request for Determination, states that:

> "The policy decision quite clearly relates only to the internal management of the Board of Podiatric Medicine since it specifically concerns those situations where that Board will not pursue an enforcement action. The practitioner is advised that the policy statement of the BPM will have no effect on any action that may or may not be taken by those other boards or by a local district attorney."[58]

If every rule which describes situations in which a board or agency will or will not act relates only to "internal management," then nearly all regulations--and numerous statutes--would fall within this definition.[59] The policy

decision at issue in this proceeding tells the practitioner of podiatry both which actions will result in prosecution (use of the "narrow" terms "physician and surgeon," "physician," or "surgeon,) and which will not (use of the "broader" terms, "podiatric physician and surgeon," "podiatric physician," and "podiatric surgeon"). The statement regarding the prohibition (and implying that prosecution is likely) for use of the "narrow" terms, although clearly a statement of general application, merely restates the law, and therefore need not be adopted as a regulation itself.[60]

The Board cites Americana Termite Co. v. Structural Pest Control Board ("Americana")[61] to support its contention that its policy decision falls within the "internal management" exception. For reasons we will discuss, that case does not aid the Board's position.

Americana arose from a challenge of the Structural Pest Control Board's suspension of the termite company's pest operator's license. The company alleged, among other things, that the Board's "active enforcement program" ("AEP"), under which the company was investigated and made subject to discipline, was a "regulation" and thus invalid unless adopted pursuant to the requirements of the APA. The court was not impressed with that argument. The court's analysis of the issue, however, is equally unimpressive.

Initially, we note that the Americana court appears to have used a "shotgun" approach to justify its conclusion that the AEP is not a "regulation." That court's entire analysis of the APA issue consisted of the following:

> "Under the Administrative Procedures [sic] Act, Government Code section 11342 et seq., [sic] an administrative agency must follow certain procedures, including giving notice to interested parties, when the agency formulates a 'regulation.' Government Code section 11342, subdivision (b), set forth below defines a '"Regulation"'as 'every rule . . . or standard of general application . . . or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it. . . ." Specifically excluded from the definition of a regulation are those rules which relate 'only to the internal management of the state agency.'
>
> "Contrary to appellant's argument, for which they [sic] cite no authority,[62] the AEP was not a regulation and therefore the Board did not have to comply with the procedural requirements of the Administrative Procedures Act. The AEP did not determine if a licensee violated the Structural

> Pest Control Act, but was merely an internal enforcement and selection mechanism. The termite inspection industry was aware of the existence of the AEP due to the open legislative hearings. The AEP investigative procedures were subject to disclosure under the California Public Records Act. [Citation omitted.] Therefore the process was not 'surreptitious' as suggested by appellants. . . ."[63]

In reading the Americana opinion, it is not entirely clear why the court ruled that the AEP is not a "regulation," subject to the requirements of the APA. Did the court mean that the AEP is not a "regulation" because the AEP is not a "rule" or "standard," but is instead a "program?"[64] Or, did the court mean that the AEP is not a "regulation" because it falls within the recognized "internal management" exception; or, perhaps because it falls within a newly created "internal enforcement and selection mechanism" exception? Was the court's finding that the AEP is not a "regulation" influenced by the fact that the termite inspection industry was aware of the existence of the AEP and because the AEP investigative procedures were subject to the California Public Records Act? Or, was the court's conclusion based on all of these factors?

Inasmuch as Americana states the obvious - i.e., that AEP is a "program" and not a "rule" or "standard" falling within the definition of a "regulation," it does not conflict with existing law. To extend the holding further, however, would be inconsistent with statutory and case law which require express exceptions to the APA and a narrow reading of the "internal management" exception. According to Government Code section 11346, APA exceptions must be (1) created by statute and (2) express. Grier v. Kizer[65] provides a good summary of case law on the subject of the "internal management" exception. That court stated:

> "Armistead v. State Personnel Board, supra, 22 Cal.3d at pages 200-201, 149 Cal.Rptr. 1, 583 P.2d 744, determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] "Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of

all . . . under the . . . statutes . . . ." [Fn. omitted.]' (Id., at pp. 203-204, 149 Cal.Rptr. 1, 583 P.2d 744, italics added.)

"Armistead cited Poschman v. Dumke (1973) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596, which similarly rejected a contention that a regulation related only to internal management. The Poschman court held: '"Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community."' (Armistead, supra, 22 Cal.3d at p. 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.) [Footnote omitted.]

"Relying on Armistead, and consistent therewith, Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130, held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody.

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by Armistead's holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception."[66]

We also note that Americana's seeming inconsistency with the body of law on the subject of the "internal management" exception has been severely criticized. The court in Grier v. Kizer stated:

". . . Without citation to authority, the Americana court concluded the enforcement program was not a regulation but merely 'an internal enforcement and selection mechanism.' [Citation.]

"Thus, the Americana court apparently concluded 'internal management' and 'enforcement' are synonymous. Its reasoning is not fully developed. The fact that a rule pertains to enforcement does not establish that it relates only to internal management." [Emphasis added.]

We further add that the term "internal management" cannot be logically equated with "enforcement." Such a view would mean that practically all agency rules would be exempt from the requirements of the APA since most rules can arguably be linked (if only tangentially) to the enforcement of law. The Legislature clearly had "enforcement" in mind when defining the term "regulation." Government Code section 11342, subdivision (b), reads:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it . . . ." [Emphasis added.]

To equate "internal management" with "enforcement" also appears contrary to the holding in Armistead. The California Supreme Court, in Armistead, recognized the distinction between purely internal rules which merely govern an agency's procedure and rules which have external impact so as to invoke the APA.[67] Certainly, rules of "enforcement" have external impact on licensees and members of the general public served by licensees.

Assuming arguendo that the holding of Americana can be reconciled with the Supreme Court case of Armistead, Americana is nonetheless unpersuasive since the facts of that case are easily distinguished from the circumstances presented in this Determination.

The AEP differs fundamentally from the policy decision at issue here. The AEP is an approved program that outlines the general scope of the Board's enforcement activities.[68] As described in the published opinion, it contains nothing which permits or prohibits any particular behavior by the Board's licensees. It simply states--in a "general description"--an approach to investigating possible violations of laws, laws which presumably exist elsewhere in statute or regulation. The Board's policy decision, in contrast, does not concern a method or approach to investigation at all. Instead, the policy decision at issue flatly states what kind of behavior is acceptable to the Board and will be left unsanctioned (at least by the Board), and what type of behavior is considered illegal and will be prosecuted.

Not only does the policy decision fail to resemble the internal management character of the AEP, its external impact is more obvious. First, as conceded in the arguments urging a finding that the challenged rule falls within the internal management exception, it obviously affects all the licensees who are bound to follow the precepts of the Board.

As mentioned earlier, if the policy decision is to be given any meaning at all, it must be meant as a guide to the behavior of the Board's licensees. Secondly, a rule such as the policy decision does affect the general public--presumably those for whose benefit the various laws regarding licensing in the healing arts and regulation of potentially misleading or fraudulent advertising are made.

The policy decision, even if its effects were limited to a small number of persons--the Board itself, its employees, licensees of the Board, and members of the public seeking podiatric care--concerns an area of great interest and controversy, that of the scope of practice and nondeceptive advertising of the "allied health professions" or healing arts other than traditional, unrestricted medical practice under the MPA.[69] In addition, the policy decision affects the pursuit (or non-pursuit) of serious penalties against practitioners, a matter of serious importance to the affected practitioners and the protected public.

The policy decision does not fall within the internal management or any of the other exceptions to the APA, which would exempt it from compliance with the APA's formal rulemaking procedures.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Board's rules are generally required to be adopted pursuant to the APA; and

(2) the Board's "policy decision" of 2/17/90 constitutes a "regulation" as defined by the key provision of Government Code section 11342, subdivision (b).

(3) the provisions of the challenged rule found to be "regulations" do not fall within any established exception to the APA; and therefore,

(4) the Board's "policy decision" violates Government Code section 11347.5, subdivision (a).

DATE: December 26, 1990

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1. This Request for Determination was filed by Astrid Meghrigian, Counsel for the California Medical Association, 221 Main Street, P.O. Box 7690, San Francisco, CA 94120-7690, (415) 541-0900. The Board of Podiatric Examiners was represented by the Law Office of Loren E. McMaster, 2400 - 22nd Street, Sacramento, CA 95818, (916) 451-1932.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "560" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless
>
> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket

No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that

part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

One public comment was submitted in this proceeding.

The Board of Podiatric Examiners Response to the Request for Determination was received by OAL on August 1, 1990, and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Center for $3.00 ($4.65 if mailed).

9. Government Code section 11347.5 provides:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been

adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.

11. Statutes of 1915, chapter 105, section 8. The statute continued, defining "chiropody" for the purpose of this act as:

> " . . . the surgical treatment of abnormal nails and superficial excrescences occurring on the feet, such as corns, callosities, and the treatment of bunions; but it shall not confer the right to operate upon the feet for congenital or acquired deformities, or for conditions requiring the use of anesthetics other than local, or incisions involving structures below the level of the true skin."

12. Webster's New World Dictionary, 2d College Ed., defines "chiropody" as "1. orig., treatment of diseases of the hands and feet; 2. same as podiatry." (New York: Simon & Schuster, 1982), p. 249.

13. Chapter 5, Division 2, of the Business and Professions Code contains the Medical Practice Act ("MPA"), commencing with section 2000. The MPA creates the state Medical Board, formerly the Board of Medical Quality Assurance, consisting of three divisions: a Division of Medical Quality, a Division of Licensing, and a Division of Allied Health Professions. Section 2003, Business and Professions Code. The Division of Medical Quality is responsible for the enforcement of the disciplinary and criminal provisions of the MPA, including review of the quality of medical practice, conduct of appropriate administrative disciplinary actions, and suspending, revoking, or otherwise limiting certificates of practice following such actions. Section 2004, Business and Professions Code. The Division of Licensing is responsible for the medical education,

licensure examination, and licensing of physicians and surgeons. Section 2005, Business and Professions Code. The Division of Allied Health Professions is responsible for the "activities of examining advisory committees and nonphysician licentiates under the jurisdiction of the [Medical] [B]oard," including licensing, appropriate disciplinary proceedings, and other aspects of regulation of nonphysician practitioners of the healing arts. [Emphasis added.]

Additional, separate statutory provisions regulate the practice of chiropractic (enacted as an initiative measure in 1922, the Chiropractic Act appears in West's Annotated California Business and Professions Code as section 1000-1, following section 1000, and in an appendix to Deerings Business and Professions Code), nursing (Business and Professions Code sections 2700 through 2837), osteopathy (enacted as an initiative measure in 1922, these provisions appear as section 3600-1, following section 3600 in West's Annotated California Business and Professions Code, and as an appendix in Deerings Business and Professions Code), and vocational nursing (Business and Professions Code sections 2840 through 2897.5).

14. Section 2001 of the Business and Professions Code provides that, within the Department of Consumer Affairs, "[t]here is . . . a Medical Board of California." Section 2003, Business and Professions Code, provides that the Medical Board is to consist of three divisions as discussed in the preceding note.

15. Business and Professions Code section 2006.

16. Webster's New World Dictionary, 2d College Edition, defines "podiatry" as "the profession dealing with the specialized treatment of the feet and, esp., with the treatment and prevention of foot disorders." (New York: Simon & Schuster, 1982), p. 1099.

17. Business and Professions Code section 2460 provides:

> "There is created within the jurisdiction of the Division of Allied Health Professions of the Medical Board of California the California Board of Podiatric Medicine."

18. Business and Professions Code section 2472 continues defining the scope of the practice of podiatric medicine:

> "No podiatrist shall do any amputation or administer an anesthetic other than local.

"Surgical treatment by a podiatrist of the ankle and tendons at the level of the ankle shall be performed only in a licensed general acute care hospital . . . ."

19. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

20. Business and Professions Code section 2470 further specifies requirements for obtaining the comments, approval, or disapproval of the Division of Allied Health Professions of the Medical Board. In addition, section 313.1 of the Business and Professions Code requires that, with specified

exceptions, rules and regulations promulgated by the boards within the Department of Consumer Affairs must be submitted to the Director of the Department for review. The Medical Board is part of the Department of Consumer Affairs (Business and Professions Code section 101, subdivision [b]); the Board is within the jurisdiction of the Division of Allied Health Professions of the Medical Board; thus, these additional requirements concerning rulemaking apply to the Board. Although none of these additional requirements directly affect this determination, they will be relevant to any future rulemaking under the requirements of the APA.

21. Section 2222, Business and Professions Code, appears in Article 12, "Enforcement," within Chapter 5, "Medicine." Section 2222 requires that the Board "shall enforce and administer this article as to podiatry certificate holders." The section also provides that "wherever the Division of Medical Quality or a medical quality review committee or a panel of the committee is vested with the authority to enforce or carry out this chapter as to licensed physicians and surgeons, the California Board of Podiatric Medicine also possesses that same authority as to licensed podiatrists."

For example, section 2234 of the Business and Professions Code requires that the Division of Medical Quality "shall take action against any licensee who is charged with unprofessional conduct." Thus, with respect to podiatrists licensed under Article 22, the Board has the same enforcement duties and authority to act. Provisions within the enforcement article include false advertising (section 2271), use without proper license of letters or terms falsely indicating authority to practice medicine (section 2274), improper use of "D.P.M." or "D.S.P." (section 2277), misuse of "doctor" or "Dr." (section 2278), and section 2314, which states that, unless otherwise provided, violation of any provision of this article is a misdemeanor.

22. California Regulatory Notice Register 90, No. 25-Z, June 22, 1990, p. 945.

23. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

24. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

25. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

26. Government Code section 11346 provides that it is the purpose of "this article" concerning the procedure for the adoption of regulations "to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes any additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

    The APA defines exceptions to its procedural requirements, such as for "any regulation not required to be filed with the Secretary of State" (Section 11346.1[a]), but none of these exceptions within the APA apply to the regulations of the Board, and the Board has not cited any other such legislation.

27. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

28. Id., 219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.

29. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of

general application applies to all members of any open class).

30. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 736 188 Cal.Rptr. 130, 135; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.

31. At page 2 of its Response, the Board does state:

> "It is firmly established that an agency remains free to apply existing law to a particular factual situation without having its action be deemed a regulation. [Emphasis added.] See Bendix Forest Products Corp. v. Division of Occupational Safety & Health (1979) 25 Cal.3d 465, 471, 158 Cal.Rptr. 882, 886. BPM has done no more than that in making its policy decision."

Although the Board's first statement regarding individual adjudications is correct in the abstract, it is irrelevant to the issue at hand. The question presented for determination is not that of the application of existing law to a particular factual situation. Other than by way of example, no particular factual situation is before OAL. Rather, the issue is whether, by having adopted a "policy" decision to be applied to all factual decisions which arise in the future, the Board has adopted a rule of general application which falls within the statutory definition of a "regulation." The very term "policy decision" strongly indicates that the challenged rule is not simply a decision in an individual case or administrative proceeding; the term "policy" suggests a general rule to guide future actions, in this instance to give licensees notice of what behavior will be regarded as acceptable, or at least as non-prosecutable in the future. This intent -- to create a policy with long-standing effect -- is also illustrated by the rule's adoption in 1984 and its reaffirmation in 1989.

Even the non-technical dictionary definition carries the implication of a standard of general application. According to the American Heritage Dictionary, Second College Edition, "policy" means:

> "1. A plan or course of action, as of a government, political party, or business, designed to influence and determine decisions, actions, and other matters;
>
> "2.a. A course of action, guiding principle, or procedure considered to be expedient, prudent, or advantageous . . . . " [Emphasis added.]

32. Response, p. 3.

33. Comment, p. 4.

34. Comment, pp. 1-2.

35. In conducting a determination proceeding under the authority of Government Code section 11347.5, OAL's role is limited to issuing "a determination as to whether the . . . order, standard of general application or other rule, is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.] Subdivision (b), Government Code section 11347.5.

However, if the Board chooses to adopt the challenged rule as a regulation following the rulemaking procedure under the APA, note that:

> "The office [OAL] shall review all regulations adopted pursuant to the procedure specified in Article 5 (commencing with Section 11346) of Chapter 3.5 [of the Government Code] and submitted to it for publication in the California Regulatory Code Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards:
>
> (1) Necessity
> (2) Authority
> (3) Clarity
> (4) Consistency
> (5) Reference
> (6) Nonduplication
>
> " . . . " [Emphasis added.]

36. Article 22, "Podiatric Medicine," of Chapter 5, "Medicine," of Division 2, "Healing Arts," of the Business and Professions Code, commencing with section 2460. The statute granting rulemaking authority to the Board does not limit that authority to implementing the provisions of Article 22 of Chapter 5, but encompasses "regulations which are necessary to enable the board to carry into effect the provisions of law relating to the practice of podiatric medicine." See also endnote 21.

37. Article 12, "Enforcement," within Chapter 5, commencing with section 2220, contains several provisions regulating advertising by health practitioners of all types as well as provisions specific to particular licenses, as discussed in endnote 21. For example, section 2277 provides that "the use of the terms or suffixes 'D.P.M.' or 'D.S.P.' constitutes unprofessional conduct" unless the user holds the appropriate certificate and has been granted the

applicable degree in podiatric medicine in accordance with the provisions of law governing medical practice in California.

38. Section 17500 of the Business and Professions Code, regarding false advertising in general, provides, in relevant part:

> "It is unlawful for any person . . . with intent to perform services, professional or otherwise, . . . to make or disseminate or cause to be made or disseminated before the public . . . any statement, concerning such . . . services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance . . . thereof, which is untrue or misleading . . . . "

39. Section 2054 of the Business and Professions Code provides:

> "Any person who uses in any sign, business card, or letterhead, or, in an advertisement, the words 'doctor' or 'physician' . . . or any other terms or letters indicating or implying that he or she is a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any other law, or that he or she is entitled to practice hereunder, or who represents or holds himself or herself out as a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any other law, without having at the time of doing so a valid, unrevoked, and unsuspended certificate as a physician and surgeon under this chapter, is guilty of a misdemeanor."

40. Section 1399.688, Title 16, CCR, adopted in 1980, provides that a licensed doctor of podiatric medicine may advertise the provision of services authorized by the license as long as the advertising does not promote "excessive or unnecessary use of such services." This regulation restates Business and Professions Code section 651, which it cites, in a manner similar to numerous other licensing boards within the Department of Consumer Affairs.

41. Section 1399.698, Title 16, CCR, establishes a scheme of citations and fines for violations of law related to the practice of podiatric medicine. Subdivision (c) sets forth the permissible amount of the fine for violations of specific provisions of law. Among others, enumerated statutes relating to the advertising and scope of practice of podiatrists include the following:

> (1) Business and Professions Code section 2052, which provides that it is a misdemeanor to advertise oneself

as practicing any healing mode for which one is not currently, validly licensed.

(2) Business and Professions Code section 2472, which defines and clarifies the scope of practice authorized by a certificate of podiatric medicine.

(3) Business and Professions Code section 651, partially implemented in the Board's regulation section 1399.688, which permits nondeceptive advertising. Section 651 also prohibits false, fraudulent, misleading, or deceptive claims or statements likely to induce the use of services. Specifically, subdivision (e) prohibits persons licensed in the healing arts from using any business card or professional notice or listing which contains a statement or claim which is false or misleading as defined in this section.

(4) Business and Professions Code section 2054, which punishes as a misdemeanor the use in any " . . . advertisement, the words 'doctor' or 'physician,' the letters or prefix 'Dr.,' the initials 'M.D.,' or any other terms or letters indicating or implying that he or she is a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any law . . . without having at the time of so doing a valid, unrevoked, and unsuspended certificate as a physician and surgeon under this chapter [Chapter 5, "Medicine"] . . . . "

(5) Business and Professions Code section 2274, which defines as unprofessional conduct the use by any healing arts licensee of "any letter, letters, word, words, term, or terms either as a prefix, affix, or suffix indicating that he or she is entitled to engage in a medical practice" other than the one(s) he or she is licensed to practice.

(6) Business and Professions Code section 2278, which provides:

> "Unless a person authorized under this chapter to use the title "doctor' or the letters or prefix 'Dr.' holds a physician's and surgeon's certificate, the use of such title, letters, or prefix without further indicating the type of certificate held, constitutes unprofessional conduct."

42. Response, p. 4.

43. Section 2055, Business and Professions Code provides in full:

> "Notwithstanding any other provision of law, a person issued a physician's and surgeon's certificate by the Medical Board of California pursuant to the provisions of this chapter shall be entitled to use of the initials 'M.D.'"

44. We note that the first sentence of the policy decision also states that doctors of podiatric medicine may not use the "narrow" terms of "physician and surgeon," "physician," or "surgeon," and indicates that such use would violate the relevant statutes and would lead to investigation and prosecution.

45. Response, p. 4, fn. 2.

46. Comment, p. 4.

47. Section 651, subdivision (i), of the Business and Professions Code requires each of the "healing arts boards . . . [to] adopt appropriate regulations to enforce the provisions of this section in accordance with [the APA]," and further requires that:

> "Each of the healing arts boards . . . shall, by regulation, define those efficacious [effective; capable of producing the desired effect] services to be advertised by business or professions under their jurisdiction for the purpose of determining whether advertisements are false or misleading."

Subdivision (b) defines a false, fraudulent, misleading, or deceptive statement or claim for the purpose of determining what is or is not unlawful communication or advertising for persons licensed under the Healing Arts Division of the Business and Professions Code and the related initiative acts.

48. The Acupuncture Examining Committee has adopted a regulation which serves a similar purpose with respect to the use of the term "Doctor" or the abbreviation "Dr." Section 1399.456, Title 16, CCR, states:

> "It is unprofessional conduct for an acupuncturist to use the title 'Doctor' or the abbreviation 'Dr.' in connection with the practice of acupuncture unless he or she possesses a license or certificate which

> authorizes such use or possesses an earned doctorate degree from an accredited . . . institution . . . .
>
> "The use of the title 'Doctor' or the abbreviation 'Dr.' by an acupuncturist as authorized above without further indicating the type of license, certificate or degree which authorizes such use, constitutes unprofessional conduct." [Emphasis added.]

In addition to implementing, interpreting, or making specific section 4955 relating specifically to acupuncture, this regulation interprets, implements, or makes specific section 2054 of the Business and Professions Code in much the same way that the challenged policy decision does.

Further, an Attorney General's Opinion issued March 3, 1988 (Advertising by Certified Acupuncturists, 71 Ops.Cal.Atty.Gen. 54), concludes that:

> "A Certified Acupuncturist who is not licensed as a physician and surgeon under the Medical practice Act may not use the initials 'O.M.D.' or the title 'Oriental Medical Doctor,'without more, in advertising an acupuncture practice. However, he or she may use the initials or the title in conjunction with further information that removes the implication that the acupuncturist is licensed as a physician and surgeon."

This Opinion analyzes much of the statutory and case law surrounding the appropriate use of terms and titles by health practitioners licensed more restrictively than physicians and surgeons under section 2051 of the Business and Professions Code. Of particular relevance to the instant determination, the Opinion notes that the use of "O.M.D." or "Oriental Medical Doctor" without further modification would violate Business and Professions Code sections 2054 and 2274 (use by any licensee of words, terms, etc., indicating entitlement to engage in a medical practice for which he or she is not licensed constitutes unprofessional conduct) as well as sections 651 and 17500 regarding misleading advertising. The Opinion continues, noting that section 2278 holds it to be unprofessional conduct to use the title "Doctor" and the letters "Dr." without further indicating the type of certificate held.

49. The courts have recognized that uncodified rules may fall within the definition of a "regulation" because their purpose is to "govern its [the agency's] procedure" (Government Code section 11342, subdivision [b]). For example, the courts have so held in City of San Marcos v. California Highway Commission, Department of Transportation, et al. (1976) 60 Cal.App.3d 405, 405-410, 131 Cal.Rptr.804, 818-821 (concerning the rule governing the deadline for

applications for allocations from the grade separation fund; the holding is based on the definition of a "regulation" in Government Code section 11371(b), which uses the same language as that in currently effective Government Code section 11342[b]); and Ligon v. State Personnel Board (1981) 123 Cal.App.3d 583, 588, 176 Cal.Rptr.717, 718 (concerning a State Personnel Board "policy" regarding the use of "out-of-class" work experience to meet the minimum qualifications for state civil service employment).

50. Response, pp. 2, 3, and 4.

51. Comment, pp. 2, 3, 6, and 7.

52. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans

Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA

exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $138.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

53. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 206-207, 149 Cal.Rptr. 1; Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596; Grier v. Kizer (1990) 219 Cal.App.3d 422, 436, 440, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.

54. Id., Armistead, Stoneham I, and Poschman.

55. 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.

56. See Poschman v. Dumke (1983) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603; and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4.

57. 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009) California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.

58. Response, p. 4.

59. As noted by the court in Grier v. Kizer, supra, 219 Cal.App.3d at p. 437, 268 Cal.Rptr. 244, 253, "whether a regulation requires affirmative conduct by an affected party is not dispositive." In other words, the challenged rule does not have to require action to be a "regulation."

60. There is no real interpretation of the existing law involved in the portion of the policy decision relating to the likelihood of prosecution for the unmodified use of the terms "physician and surgeon," "physician," and "surgeon." Section 2054 of the Business and Professions Code specifically prohibits this usage, establishing it as a misdemeanor. Little more than restatement is involved in deducing that the words of the statute, "uses . . . any other terms . . . indicating or implying that he or she is a physician and surgeon, physician, surgeon, or practitioner under the terms of this . . . law" refer to the use of the words "physician and surgeon," "physician," or "surgeon."

Regulation section 1399.698, subdivision (c)(2)(E), Title 16, CCR, provides that the Board may issue a citation and assess a fine of from $100 to $1000 for a violation of section 2054, among other sections. Thus, the prohibition on the use of the terms mentioned and the jurisdiction of the Board to sanction such use already appear in existing provisions of law, and the portion of the policy decision which simply restates the law need not be adopted formally as a regulation under the requirements of the APA.

61. (1988) 199 Cal.App.3d 230, 244 Cal.Rptr. 693.

62. It is important to note that neither the appellant nor the respondent adequately briefed the court on the APA issue. On that issue, appellant's brief quoted Government Code section 11342, subdivision (b), for the definition of a "regulation," and thereafter concluded that:

> "The AEP falls within the above definition of a regulation as a revision of a standard of general application and as a revision of an otherwise standard and statutory procedure for disciplinary actions." (Appellant's Opening Brief, pp. 21-22.)

The respondent's brief was no more helpful. It argued in part that the AEP was "merely an internal management tool to guide respondents in commencing and evaluating a program such as AEP and is like the many other internal policies and

guidelines used by various enforcement agencies to screen, evaluate, investigate and otherwise handle cases before formal disposition is decided upon." (Respondent's Brief, p. 14.)

63. Americana, supra, 199 Cal.App.3d at pp. 233-234, 244 Cal.Rptr. at p. 695.

64. The respondent in the Americana case specifically argued that, "an enforcement program is simply not 'a standard of general application,' within the meaning of Government Code section 11342(b)" (Respondent's brief, p. 14)

65. Supra, 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

66. Id., 219 Cal.App.3d at pp. 436, 268 Cal.Rptr. at pp. 252-253.

67. Armistead, supra, 22 Cal.3d at pp. 203-204, 149 Cal.Rptr. at pp. 3-4.

68. Once the Board had approved the general description of the program, the deputy registrar

> "would select companies with the largest numbers of complaints within a geographical area. A Board investigator contacted various homes in the geographical area to request the homeowner participate in the program. Investigators would inspect each home to determine if there were infestations or conditions likely to lead to infestations." 199 Cal.App.3d.230, 231, 244 Cal.Rptr. 693, 694.

Then, the homeowner would be asked to contact the company under investigation for an inspection; the company would file the required reports with the Board; and the Board would analyze and evaluate the reports. If problems were revealed, disciplinary action against the company would follow. This litigation followed events occurring in 1982, after the Board's adoption of the "AEP" describing the general approach to its enforcement activities for that year.

69. Section 2051 of the Business and Professions Code provides that the

> "physician's and surgeon's certificate authorizes the holder to use drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions."

Other certificates may license practitioners to perform some of the same activities, but are restricted in various ways. For example, the certificate to practice podiatric medicine permits the same range of treatment but restricts the practice to the foot and immediately related regions (Business and Professions Code section 2472); and the license to practice chiropractic allows some similar activities but with a different methodology, permitting care of the entire body, but prohibiting surgery or the use of medications. See section 1000-7, following section 1000 in West's Annotated California Business and Professions Code, or appendix, Deerings Annotated Business and Professions Code for Initiative Measure, Stats. 1923, p. xc, section 7).

70. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.